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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-485

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Petitioner,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO•CLC, Respondent,
and
THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondent the United Steelworkers of America, AFL-CIO • CLC (hereinafter "Steelworkers Union"), respectfully asks that the Petition For A Writ of Certiorari which is pending in the above captioned case be denied forthwith because the order which underlies this Petition is a pre-trial order compelling discovery and the pendency of this Petition materially disrupts the progress of the case towards trial in the District Court.

OPINIONS BELOW

There is no official report of the District Court's Opinions (Pet. App. 34a-43a) and the Opinion of the Court of Appeals (Pet. App. 1a-6a) is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the "collateral order" exception to the final judgment rule should be extended to create an immediate appeal of right for any party who is ordered to answer interrogatories during the pre-trial stages of that party's own lawsuit which is pending in a federal district court?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Constitution of the United States, of the Judicial Code, and of the Federal Rules of Civil Procedure are set forth in the Petition at pp. 2-4. However the most pertinent provision of all was omitted, Rule 26(b)(1) of the Federal Rules of Civil Procedure which reads as follows:

> "(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

STATEMENT

On July 25, 1972, the litigation which underlies this Petition was commenced by the Chamber of Commerce of the United States of America (hereinafter "Chamber") and The Dow Chemical Company (hereinafter "Dow") as co-plaintiffs against various officials of the Michigan Employment Security Commission (MESC) as defendants (Pet. App. 11a-21a). The Complaint alleges a violation of the Supremacy Clause of the Constitution of the United States and seeks declarative and injunctive relief against the continuation by MESC of Michigan's policy of paying unemployment compensation to all workers who are voluntarily unemployed from *bona fide* employment without regard to fact that workers so unemployed may also be striking employees of another previous employer (Pet. App. 17a). The Steelworkers Union intervened to protect the interests of its members who were in the midst of conducting a lawful strike against Dow.

The allegations of the Complaint were couched in the terms of the elements of the "macrocosmic test"[1] —first articulated as the standard governing Supremacy Clause challenges to the payment of welfare benefits to striking workers in *I.T.T.* v. *Minter* 435 F.2d 989 (1st

1. Consonant with the third element of the "macrocosmic test" that strikes are prolonged by the availability of unemployment compensation, the Complaint alleges:

> "The striking employees have continued to reject Dow's various offers of strike settlement as a direct result, upon information and belief, of their knowledge that unemployment benefits have been provided to them, and expectation that such benefits will continue to be provided to them, by Defendants." (Pet. App. 16a).

Cir. 1970) *cert. denied,* 402 U. S. 933 (1971) and later held to govern such unemployment compensation challenges in *Grinnell* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U. S. 858, 879 (1973). Under the "macrocosmic test" as articulated in *Grinnell,* a factual inquiry must be made into whether the receipt of unemployment benefits by strikers or the expectation of such receipt results in: (1) workers stiffening bargaining demands beyond that which they would have demanded absent the availability of such benefits; (2) workers striking when absent such availability they would have settled without a strike; and, (3) strikes continuing for longer periods of time and resulting in higher settlements than would have resulted without such availability. 475 F.2d at 458. In their brief filed in opposition to dismissal motions, the Chamber and Dow interpreted their own Complaint as alleging that the challenged Michigan policy has had the effect of prolonging strikes and/or necessitating higher wage settlements to end strikes, and they further stated that they would present "empirical evidence" at trial substantiating these allegations.[2] Taking the allegations of the Complaint as proven, the District Court overruled the motions to dismiss but not without placing the mandate upon the parties to proceed expeditiously with the discovery necessary to prepare the case for trial. *Dow Chemical Co.* v. *Taylor,* 57 F.R.D. 105, 108 (E.D. Mich. 1972).

2. The representations set forth above are contained at page 8 of the "Memorandum in Opposition To Motions to Dismiss" which the Chamber and Dow jointly filed in the District Court in 1972 and which was part of the record on appeal.

Three years have since elapsed, and the proceedings in the District Court are still in the pre-trial discovery stage. The progress towards trial came to a standstill when the Chamber began its efforts a year ago to obtain pre-sanction appellate review of the District Court's order compelling it to answer the following interrogatory:

> "1. List the name, principal office address and Michigan address of each 'underlying' member business firm of the Chamber . . . who is now or who at any time since January 1, 1968 has been an employer subject to the Michigan Employment Security Act, 12 M.S.A. § 17.501 *et seq.* (hereafter 'MESA')." (Pet. App. 23a).

The challenged interrogatory was one of a set of twenty-two interrogatories which the Steelworkers Union served upon the Chamber on April 28, 1973 (Pet. App. 33a). The Chamber and Dow had repeatedly argued that the "macrocosmic test" defined the scope of the issues discoverable in this litigation,[3] and Interrogatories 13 through 22 of that set require the Chamber to document in detail its position with regard to each element of the macrocosmic test (Pet. App. 28a-33a). In the joint Complaint, the Chamber had also alleged that its "member-employers . . . are also suffering and

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3. For instance, in a discovery brief which Dow and the Chamber jointly filed with the District Court in 1973, contentions identical to the elements of the macrocosmic test were set forth as defining the issues to which the documents they sought to have produced were relevant (Opp. App. 2a). Moreover, Dow and the Chamber relied directly upon the then "recent decision" in *Grinnell* as supporting their motion to produce, and a copy of the *Grinnell* decision was appended to that brief (Opp. App. 2a n.1).

will continue to suffer irreparable injury . . ." as a result of the challenged Michigan policy (Pet. App. 16a), and Interrogatories 2 through 6 require the Chamber to document in detail that injury (Pet. App. 24a-26a). As expected, the Chamber's response to all of these interrogatories was evasive and incomplete.[4] Therefore, obtaining the membership list requested in Interrogatory No. 1 became essential[5] because only by approaching the Chamber's members directly would the Steelworkers Union be able to obtain information about the injury, alleged in the Complaint, that these employers had suffered in strike and *non-strike*[6] situations as a result of the challenged state policy.

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4. With regard to the injury allegedly suffered by its member-employers, the Chamber responded that it has "no studies or information concerning its members in this respect." (Opp. App. 7a). With regard to the complete and detailed identification requested of those strikes upon which the Chamber would rely to prove the elements of the "macrocosmic test," the Chamber simply made a general reference to any strikes mentioned in the prior depositions and affidavits which were already on file in the litigation (Opp. App. 7a-8a). There are enumerable strikes mentioned in those materials, and the Steelworkers Union still does not know upon which of those strikes the Chamber will rely at trial.

5. Had the Chamber answered all the interrogatories, except for Interrogatory No. 1, in full and complete detail, the Steelworkers Union would not have been able to press its request for the membership list.

6. It must always be remembered that under the *Grinnell* "macrocosmic test," the experience of the Chamber's members as Michigan employers in non-strike situations is also highly relevant. 475 F.2d at 458. The Chamber itself emphasizes the importance of non-strike situations when it claims that it has "alleged and will seek to prove" that the Supremacy Clause is violated because the availability of unemployment compensation

On June 27, 1974, the District Court filed its Memorandum Opinion granting almost all of the relief which the Steelworkers Union had sought in its November 20, 1973 motion to compel. With regard to the Chamber's claim that disclosure of the membership list would violate the First Amendment associational rights of its members, the Memorandum Opinion explicitly noted the complete lack of an evidentiary showing by the Chamber that any harm would come to the Chamber's members upon disclosure (Pet. App. 36a n.1). On October 8, 1974, the District Court entered its order compelling discovery and also entered a strong protective order, similar to that originally proposed by the Steelworkers Union, prohibiting public disclosure of the membership list (Pet. App. 8a, 37a). Thereafter, the Chamber filed a motion for reconsideration with supporting affidavits. The District Court denied the motion for reconsideration on the grounds that the Chamber had shown no more than "speculative fears of future harm" that were "largely premised on public dissemination of the list,"—dissemination which was already forbidden by the entry of the "strong protective order." (Pet. App. 43a).

The Chamber filed a timely appeal on November 4, 1974, but it was not until some four months later that the Chamber, apparently as an afterthought, requested in the concluding section of its appellate brief that a writ of mandamus be issued (Pet. App. 6a). The Court of Appeals dismissed the appeal and denied the petition for a writ (Pet. App. 6a). The Chamber filed a timely

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to strikers in Michigan causes employees to reject collective bargaining offers made by employers "consequently *increasing settlements* and/or prolonging strikes." (Opp. App. 2a) (emphasis added).

petition for rehearing and suggestion for rehearing en banc. No judge in regular active service on the Court of Appeals requested that a vote be taken on the suggestion, and the Chamber's petition for rehearing was denied on August 21, 1975 (Pet. App. 10a). The Court of Appeals has stayed the issuance of its mandate pending this Court's resolution of this Petition.

ARGUMENT

The basic issue in this Petition is an extremely narrow one—whether there is under the particular facts of this case any reason why a party plaintiff should be accorded an immediate appeal of right or accorded appellate review via mandamus of a pre-trial discovery order compelling it to answer an interrogatory seeking information which has been judicially determined to be relevant and non-privileged.

Of course, the Chamber argues that great constitutional issues are involved and that the Court of Appeals adheres to an archaic view of its appellate and mandamus jurisdiction which is impermissibly insensitive to the need for immediate review of great issues such as this case presents. Nothing could be farther from reality; for as we show herein, an examination of the prior decisions of the Court of Appeals establishes that the truly extraordinary cases or those cases involving significant hardship are accorded immediate review. The fact of the matter is that the Chamber failed to prove its case in the District Court and failed to show any hardship involved in the denial to it of immediate appellate review. Moreover, these evidentiary shortcomings are fatal to any attempt to portray this decision dismissing the Chamber's appeal as one which creates a conflict between circuits or as one which involves a burning issue of the day.

It is important to note that the Chamber also sought immediate appellate review before the First Circuit of an order compelling it to answer an almost identical interrogatory in *Grinnell,* and review by appeal and mandamus was similarly denied. *Grinnell Corporation* v. *Hackett,* 519 F.2d 595 (1975). A petition for a writ of

certiorari, No. 75-484, is also pending before this Court with regard to that decision, and the Argument which follows is made in opposition to granting a writ of certiorari in both this case, No. 75-485 and in *Grinnell,* No. 75-484.

I. The Decision Below Is Clearly Correct.

The Chamber's Petition presents the very narrow issue of the correctness of the denial by the Court of Appeals of immediate appellate review of this interlocutory discovery order. It does not present for review the merits of the District Court's discovery order, and it certainly does not present for review the substantive merits of the underlying unemployment compensation—Supremacy Clause litigation.

Before turning to the question of appellate jurisdiction, it is important to recognize the narrow but solid foundation upon which the District Court bottomed its discovery order. After nearly a year of litigation concerning the disclosure issue, the District Court concluded that the information sought by Interrogatory No. 1 was both relevant and non-privileged and was therefore discoverable under the provisions of Rule 26(b)(1) of the Federal Rules of Civil Procedure (Pet. App. 35a, 36a-37a).

With respect to relevance, the District Court noted the repeated claims made in the joint complaint about the alleged injury, even alleged irreparable injury, which the Chamber's members had sustained and would sustain as a result of the challenged state policy (Pet. App.

35a).[7] The District Court concluded that Interrogatory No. 1 which was directed towards discovering the factual basis for these allegations made in the joint complaint was "by definition relevant to the issues raised in the case." (Pet. App. 35a, 36a).

With regard to the Chamber's claim that disclosure of the membership list would violate the First Amendment associational rights of its members, the District Court applied the balancing test announced by this Court in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449 (1958). Under that test, a district court is required to make a factual determination of the "likelihood of substantial restraint" upon associational rights if disclosure of a membership list were to be required and then to delicately balance the proven harm against the public interest in the fair administration of justice through full disclosure of all

7. For example, the Complaint alleges:

"Dow, and similarly situated member-employers of the Chamber, are also suffering . . . irreparable injury . . . ." (Pet. App. 16a, Complaint V.10);

"Unless enjoined, said unemployment benefits will continue to constitute a substantial alternate source of income for a substantial number of the striking employees who presently are engaged in . . . a strike against member-employers of the Chamber." (Pet. App. 16a, Complaint, V.9);

"The payment by Defendants of unemployment benefits to the striking employees . . . deprives Dow and said member-employers of the right to free collective bargaining without state interference. . . ." (Pet. App. 17a, Complaint VI.1); and

"The payment . . . indirectly, but not insubstantially, requires Dow and said members to finance through their contributions to the Commission strikes against themselves to their irreparable injury . . . ." (Pet. App. 17a, Complaint VI.1).

relevant facts in pre-trial discovery. 357 U. S. at 462, 464-465. The District Court made an initial factual finding that the "Chamber has presented nothing but the bare assertion" that its members will be harmed by disclosure (Pet. App. 36a n.1). When the Chamber subsequently did come forward with affidavits depicting confrontations that had occurred between Chamber members and *other* unions, the District Court concluded that the Chamber had presented nothing more than "speculative fears of future harm" that "are largely premised on public dissemination of the list." (Pet. App. 43a). The District Court concluded that there was no substantial threat of harm because he found that the "strong" protective order previously entered "will protect the list from public disclosure." (Pet. App. 43a). These factual determinations are fatal to the Chamber's claim of constitutional privilege, and those findings cannot be overturned on appeal unless clearly erroneous. Fed. R. Civ. P. 52(a).

In light of the District Court's findings that the list of Chamber's members was non-privileged and relevant, the Court of Appeals quite correctly declined to hold that this discovery order was immediately appealable as of right under the "collateral order" doctrine enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949). To be immediately appealable under *Cohen,* an order must:

> "[F]all in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546.

This discovery order is certainly not separable from the issues in the basic litigation. The propriety of that order turns upon the correctness of the District Court's finding that the membership list is relevant to this litigation—a finding which required the District Court to determine what the issues in this litigation are, or may be, and to determine whether disclosure of the membership list would tend to lead to the revealing of facts related to those issues. Fed. R. Civ. P. 26(b)(1). To review this discovery order, an appellate court would, at the very least, have to determine for itself what the issues are in this case. Therefore, this discovery order cannot be appealable under *Cohen* because an issue ceases to be "collateral" when its resolution can be decided "only by making reference to the substantive litigation . . . ." *Borden Company* v. *Sylk,* 410 F.2d 843, 846 (3d Cir. 1969); *accord, Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 597 (1st Cir. 1975).

Unlike the situation in *Cohen,* this discovery dispute cannot be said to have been "finally determined" because the District Court has yet to determine, in the exercise of its discretion under Fed. R. Civ. P. 37(b), what sanctions should be imposed upon the Chamber if it persists in its non-compliance. Also unlike *Cohen,* a right of immediate review is unimportant here because the strong protective order prevents the occurrence of irreparable injury to the Chamber's members even if appellate review is delayed until the Chamber's right of appeal from a final judgment has matured. 337 U. S. at 546.

Finally, there is a policy consideration which militates against applying *Cohen* to this type of order. Even if the Court of Appeals had accepted and decided the

appeal on its merits, it could not have further settled the law concerning the propriety of pre-trial discovery orders compelling the disclosure of membership lists. The right of the Chamber, as an association, to refuse to answer an interrogatory seeking the identification of its members has already been well established by this Court's decision in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449 (1958). The dispute here is not with the law but with the correctness of the District Court's factual finding that the Chamber failed to meet its evidentiary burden of showing danger to its members from the disclosure of the membership list under the aegis of a protective order. The most that the Court of Appeals could do would be to reverse this factual finding. In each subsequent case the factual determinations will always be different, and hence appealable, and the extension of *Cohen* to this area will, as the Court of Appeals found, simply result in the inundation of appellate dockets (Pet. App. 4a). *Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 597 (1st Cir. 1975); *accord, I.B.M.* v. *United States,* 480 F.2d 293, 298 (2d Cir. 1973) (en banc), *cert. denied,* 416 U. S. 979 (1974).

The fact that this Court's decision in *N.A.A.C.P.* v. *Alabama, supra,* has clearly defined the standard governing the Chamber's claimed constitutional privilege to refuse to answer this type of interrogatory also justifies the refusal by the Court of Appeals to review this discovery order through the issuance of a writ of mandamus (Pet. App. 6a). In the very decision cited by the Chamber, *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964), this Court explained:

> "This is not to say, however, that following the setting of guidelines in this opinion, any future alle-

> gation that the District Court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy." 379 U. S. at 112.

This Court's decision in *N.A.A.C.P.* v. *Alabama, supra,* has laid down all the necessary ground rules with regard to discovery of membership lists, and the Court of Appeals properly declined to issue the writ to review the factual determinations which the District Court made in applying the clearly defined *Alabama* standard. *See, National Right To Work Legal Defense* v. *Richey,* 510 F.2d 1239, 1244 (D.C. Cir. 1975), *cert. denied,* 95 S. Ct. 2631 (1975).

Thus the Court of Appeals was entirely correct as a matter of law in deciding to deny immediate appellate review of this interlocutory discovery order. Indeed, this case illustrates the wisdom of the congressional judgment embodied in 28 U.S.C. § 1291 which established a system of appeals solely from final judgments and rejected the system of piecemeal appeals. This case has been delayed in the pre-trial stage for over a year now because the Chamber has attempted to take just such a piecemeal appeal. A firm trial date of May 27, 1975, had to be vacated because of the pendency of this appeal in the Court of Appeals, and thousands of dollars have already been expended in the processing of this frivolous appeal. The pendency of this Petition only further delays and disrupts the trial process, and the Petition should be denied as soon as practicable.

II. There Is No Conflict of Decision.

The Chamber claims that there is serious division in the circuits with regard to the applicability of the *Cohen* doctrine to interlocutory discovery orders which affect the rights of third parties (Pet. 15-16). No direct conflict in decisions is cited, but the Chamber vaguely suggests that there is a conflict between the decision here and that of the Tenth Circuit in *Covey Oil Co.* v. *Continental Oil Co.,* 340 F.2d 993 (1965), *cert. denied,* 380 U. S. 964 (1965). The conflict is non-existent because while *Covey* permits an immediate appeal from a pre-trial discovery order, it did so only because the appellant was a non-party. Here by contrast the Chamber is a party plaintiff, and the Tenth Circuit has itself denied a *Cohen* appeal to a party litigant in *Paramount Film Distributing Corp.* v. *Civic Center Theatre,* 333 F.2d 358, 361-362 (1964). Indeed, the Tenth Circuit relied on this distinction between parties and non-parties when it stated in *Covey*:

> "Our recent decision in Paramount Films Dist. Corp. v. Civic Center Theatre, 10 Cir., 333 F.2d 358, has no application because there the complaints against discovery were made by parties to the litigation." 340 F.2d at 995 n.5.

Thus by its own terms, *Covey* offers no solace to the Chamber and announces no Rule which conflicts with the holding by the Court of Appeals here.

The absence of a conflict is confirmed by the similarity between the principle underlying *Covey* and the principle applied by the Court of Appeals in other cases that an immediate appeal will lie if it represents "the only opportunity which the . . . parties will have to *effec-*

tively review the District Court's order." *Ochsner* v. *Millis,* 382 F.2d 618, 623 (6th Cir. 1967) (Emphasis in the original), *accord, Horizons Titanium Corporation* v. *Norton Company,* 290 F.2d 421 (1st Cir. 1961); *see, Gillespie* v. *United States Steel Corporation,* 321 F.2d 518 (6th Cir. 1963), *modified,* 379 U. S. 148 (1964). In *Covey,* as in *Ochsner,* the person seeking immediate appellate review had "no right of appeal from a judgment therein." 340 F.2d at 996. In both cases, there were no other effective avenues of appeal available such as review through contempt. The appellant in *Ochsner* simply had no order with which to refuse to comply because he had been denied discovery, 382 F.2d at 619, and in *Covey,* review through contempt was held to be inadequate as too great a "hazard of punishment" to be required of non-party witnesses. 340 F.2d at 996.

No such problems are presented here for if the Chamber is to be believed, the secrecy of the list of Chamber members is crucial to the continued existence of the Chamber as a viable association (Pet. 9 n.9). Therefore the officials of this party plaintiff can be expected to willingly risk contempt to avoid disclosure just as the officials of the N.A.A.C.P. did in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 451 (1958). Moreover, the Chamber, as a party plaintiff, does have a right of appeal from the final judgment in this litigation, and the protective order prevents its members from suffering any harm before that right of appeal matures. Finally, the Chamber may obtain immediate appellate review without disclosing the list of its members by respectfully declining to comply with the District Court's order and having contempt or dismissal imposed under Fed. R. Civ. P. 37(b) as the penalty for its non-compliance. *Hickman* v. *Taylor,* 329 U. S. 495 (1947) (Appeal from criminal

contempt); *United States* v. *Procter & Gamble Co.,* 356 U. S. 677 (1958) (Appeal from dismissal sanction); *See, N.A.A.C.P.* v. *Alabama, supra* (Appeal from civil contempt). All other party litigants must first submit to the sanctions procedure established in Fed. R. Civ. P. 37(b) before any appeal can be taken, and it would be wrong to permit associational parties to bypass that procedure on the grounds that they are a special class of litigants. *Schlagenhauf* v. *Holder,* 379 U. S. 104, 113 (1964).

The refusal to issue a writ of mandamus in this case does not create a conflict in the circuits. The Chamber implies that there is such a conflict by comparing the decisions of the Fourth, Seventh and Eighth Circuits in which pre-trial discovery orders were reviewed by mandamus (Pet. 22 n.17) with the denials of the writ herein and in a decision of the Ninth Circuit to which this Court has granted a writ of certiorari. *Kerr* v. *U. S. District Court,* 95 S. Ct. 1988 (No. 1023, 1974 Term). There is no conflict because neither the Court of Appeals nor the *Kerr* court held that mandamus would never lie to review pre-trial discovery orders. The Court of Appeals went no further than holding that the Chamber "failed to meet its burden of showing extraordinary circumstances which would entitle it to mandamus." (Pet. App. 6a). *Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 599 (1st Cir. 1975). When such a showing of extraordinary circumstances is made, the Court of Appeals does utilize mandamus to grant immediate review of a pretrial discovery order. *United States* v. *U. S. District Court,* 444 F.2d 651, 655-656 (1971), *aff'd,* 407 U. S. 297 (1972); *accord, In Re Union Leader Corporation,* 292 F.2d 381 (1st Cir. 1961), *cert. denied,* 368 U. S. 927 (1961); *Hartley Pen Co.* v. *U. S. District Court,* 287

F.2d 324 (9th Cir. 1961). Thus the decision in this case does not establish a division in the circuits, and the Petition should be denied.

III. There Is No Important Question of Federal Law.

The Chamber attempts to create important federal issues by concentrating on collateral matters which were not necessary to the District Court's decision and which may never become an issue in this litigation. For instance, the Chamber raises a sham issue when it claims that lurking in this case is the supposedly unsettled question of the scope of First Amendment rights which a corporation may exercise (Pet. 10). The District Court did not bottom its order on a rejection of the Chamber's position. Indeed, the District Court never ruled upon the merits of this issue (Pet. 10 n.10). *Compare, Grinnell Corporation* v. *Hackett,* 519 F.2d 595, 598 (1st Cir. 1975). Likewise the correctness of the District Court's waiver holding is not genuinely raised by this Petition as the Chamber argues (Pet. 11). This is so because the waiver holding is no more than an alternate grounds for the decision which is, in any case, solidly premised upon the Chamber's failure to sustain its evidentiary burden of proving that disclosure of the membership list presented any danger whatsoever to its members (Pet. App. 36a n.1).

Through a bit of linguistic legerdemain, the Chamber turns the District Court's rather commonplace relevancy determination into a decision which it claims threatens the very future of all association litigation (Pet. 7-8). In the Petition, the Chamber characterizes the allegations in the joint Complaint concerning injury to its members as directed solely to meeting the standing

requirement enunciated in *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). However, the Chamber went far beyond the standing requirement and repeatedly alleged that its members were suffering particularized injury of the type that would be necessary to sustain the burden of proof under the "macrocosmic test."[8] Moreover, in one of the Prayers for Relief, the Chamber sought injunctive relief which would have benefited not all Michigan employers but only Dow and "the member employers of the Chamber . . . ." (Pet. App. 19a, Complaint VIII. 3). These repeated allegations of particularized injury, led the District Court to conclude that the identity of the members must be disclosed because the Complaint claims "much . . . for or about these member-employers which is not claimed for or about employers generally." (Pet. App. 35a). Alleging the specific injury that is essential to establishing a prima facie case goes far beyond the requirements set forth in *Sierra Club* which could have been met here by simply alleging that the Chamber's members are subject to the Michigan law and that the challenged Michigan policy has an adverse impact on them. 405 U. S. at 734-735. Thus the case presents no threat to the future of associational litigation because it is a unique case in which the association's members also constitute a source of past experience which is highly relevant to the proper disposition of the substantive merits of the case.

Finally, the Chamber invites this Court to utilize this case as a vehicle to establish a procedure which will permit "immediate appeals from discovery orders where disclosure impinges upon constitutional rights . . . ." (Pet. 14). Creating such immediate appeals of

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8. *See,* Argument, *supra* at 12 n.7.

right would be unwise because it would increase the incidence of unnecessary constitutional adjudications which all courts have a duty to avoid. *See, e.g., Communist Party, U.S.A.* v. *Catherwood,* 367 U. S. 389 (1961). Congress has provided a "safety valve" covering just those sort of cases by allowing discretionary appeals of certified issues under 28 U.S.C. §1292(b), but the District Court declined to so certify the disclosure issue in this case (Pet. 7). Moreover, if truly important constitutional issues do arise in the pre-trial context, appellate courts may review these issues through the discretionary issuance of writs of mandamus. *See, e.g., United States* v. *U. S. District Court,* 444 F.2d 651, 654-656 (6th Cir. 1971), *aff'd* 407 U. S. 297 (1972; *Cf. In Re Union Leader Corporation,* 292 F.2d 381 (1st Cir. 1961); *In Re United States,* 348 F.2d 624 (1st Cir. 1965).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE DOW CHEMICAL COMPANY and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Plaintiffs,
and
S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendants,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO CLC, and INTERNATIONAL UNION, UAW,
Intervenors.

MEMORANDUM IN SUPPORT OF MOTION FOR ORDER COMPELLING DEFENDANTS TO PRODUCE CERTAIN DOCUMENTS FOR INSPECTION BY PLAINTIFFS.

On February 27, 1973, Plaintiffs served a request for production upon the Defendant-Intervenors for inspection of certain documents on May 29, 1973, pursuant to Rules 26 and 34 F.R.C.P. The Defendant-Intervenors have objected to the production of items 4, 5, 8 and 9 on the sole ground that those documents fall within the attorney-client privilege. The Defendant-Intervenors have

asserted the privilege, however, without so much as an affidavit to support their claim. This bare claim of privilege by the Defendant-Intervenors is not sufficient, as described below, to exempt these disputed documents from discovery pursuant to Rules 26 and 34, F.R.C.P.

Pursuant to Rule 26(B)(1), F.R.C.P. Plaintiffs need only demonstrate that the disputed documents are relevant, which, of course, does not require that the documents are admissible evidence but only that they are "reasonably calculated to lead to the discovery of admissible evidence." At the threshold, therefore, it is necessary to define the issues.

1. Plaintiffs have alleged and seek to prove that the Commission has contravened federal labor policy and the Supremacy Clause of the Constitution by undermining the core of that policy—collective bargaining. As Plaintiffs have alleged, the Commission's disbursement of substantial subsidies to striking employees, within the meaning of the National Labor Relations Act amended (29 U.S.C. §§ 151 *et seq.*), has two interrelated effects: *first,* the knowledge of, and actual availability of such benefits result in the rejection of collective bargaining offers made by employers which would have otherwise been accepted, consequently increasing settlements and/or prolonging strikes; and *second,* the payment of those subsidies both permits and causes collective bargaining agents to maintain hard bargaining positions while awaiting attrition to compel employer to capitulate.

In *Grinnell Corporation v. Hackett,*[1] a recent decision involving, as here, the payment of unemployment

1. Nos. 72-1275 and 72-1276 (1st Cir. Mar. 15, 1973). A copy of the opinion is attached hereto.

compensation to striking workers, the Court of Appeals For the First Circuit stated what it regarded as the fundamental factual question at issue: "the causal relationship between the receipt of benefits, which unions obviously desire and often actively seek, and longer, costlier strikes . . . ." If such a causal relationship could be established, then according to the Court, the plaintiffs might well have proven their case.

With this objective in mind, therefore, and in order to demonstrate that very causal connection, Plaintiffs have requested the Defendant-Intervenors to turn over for inspection items 4, 5, 8 and 9 which are, Plaintiffs believe, directives to Union locals instructing them how to utilize government subsidies during collective bargaining. Through these various memoranda, Plaintiffs will seek to demonstrate the reliance placed by striking employees and their Union on the availability of public subsidies, and the resultant effect on the collective bargaining process.[2]

2. When a party claims that an otherwise discoverable document is privileged, "[i]t is axiomatic that the claimant of a privileged [attorney-client] has the burden of establishing that he has the right to it." *Jan Danish v. The Guardian Life Ins. Co. of America,* 18 F.R.D. 77 (S.D.N.Y. 1955).[3] Every element of the privilege must be established. *Commercio & Industria Continental, S.A.*

2. A variety of similar documents have been requested and produced without dispute.

3. To the same effect, see *Boushar v. U.S.,* 316 F.2d 451, 456 (8th Cir. 1953); *C. V. Mattson v. Cuyona Co.,* 178 F.Supp. 653, 654 (D. Minn. 1959); *Honeywell, Inc. v. Piper Aircraft Corp.* 50 F.R.D. 117, 120 (M.D. Penn. 1970); *Camco, Inc. v. Danish Oil Tools, Inc.,* 45 F.R.D. 384 (S.D. Texas, 1968).

v. Dresser, 19 F.R.D. 513, 514 (S.D. N.Y. 1956). In the present case, the Defendant-Intervenors, in their Answer for Production of Documents, have made a bare claim to confidentiality. Such an unsupported assertion is entirely insufficient to invoke the privilege.

At the outset, the Defendant-Intervenors were required to prove that the disputed communications constitute "Legal advice . . . from a professional legal adviser in this capacity as such." 8 Wigmore, Evidence, §2290 (McNaughton Rev. 1961). Accordingly, if an attorney was not acting as a legal adviser, such communications are not privileged. *Id.* at 514.[4] In sum the privilege does not arise from a bare claim, as here, that the "sender or receiver of the communication is a lawyer" or that the title of a document contains the word "Legal". *Honeywell, Inc. v. Piper Aircraft Corp., supra,* p. 119. See also, *Boushar v. U.S.,* 316 F.2d 451 (8th Cir. 1953).

3. In the instant case, moreover, it is apparent that the privilege is inapplicable, and production should be promptly ordered. *First,* when dealing with a large organization, the privilege is limited to legal advice given to the "control group" with the power to make policy decisions, and who, accordingly, constitute the client within the purview of the privilege. *Natta v. Hogan,*

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4. E.g., the following communications have been held to fall outside the attorney-client privilege because the attorney was not acting as a legal adviser: *In re Colton,* 201 F.Supp. 13 (S.D. N.Y. 1961), and *Olender v. United States,* 210 F.2d 795 (9th Cir. 1954), where the attorney acted principally as an accountant; or in *Lowy v. Commissioner,* 262 F.2d 809 (2d Cir. 1959), where the attorney acted simply as a scrivener of deeds or simply deposited money in a bank for his client.

392 F.2d 686 (10th Cir. 1968). A contrary interpretation—extending for example, the "control group" to include hundreds of local union agents scattered across the nation—would permit the emasculation of the discovery processes by simply funnelling all directives through the union's General Counsel. Such persons clearly do not "possess the authority to control, or substantially participate in the decisional process," of an international union, as is required to invoke the privilege. *Natta v. Hogan, supra,* p. 692. Instead, the documents here involved are received merely as directives or orders issued, after the decisional process has been completed at the international level, by subordinate officials for implementation. Such documents do not constitute, therefore, "a communication made in the course of seeking legal advice from a professional legal adviser in his capacity as such." *Olender v. United States,* 210 F.2d at 806.

Second, it similarly cannot now be contended that the disputed memoranda, which flowed to hundreds of representatives for consideration with their colleagues at the local union level, were considered confidential. Such documents were intended to be "conveyed to others" and, accordingly, are "not privileged." *U.S. v. Pellier,* 255 F.2d 446, 447 (2nd Cir. 1958); 8 Wigmore §2311. In fact, even assuming *arguendo* that these documents were once privileged while within the control group, that "status [was lost] by subsequently being a broadcast to a large constituency." Pye, *Fundamentals of the Attorney-Client Privilege,* 15 Practical Lawyer 15 (Nov. 1969). Any "cloak of confidence" was simply dissipated. *United States v. Kelsey-Hayes Wheel Co.,* 15 F.R.D. 461, 464 (E.D. Mich. 1954).

4. In conclusion, Plaintiffs request that the Defendant-Intervenors be compelled to produce the requested documents.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE DOW CHEMICAL COMPANY and THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Plaintiffs,
v.
S. MARTIN TAYLOR, Director of the Michigan Employment Security Commission, et al.,
Defendants,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Intervenors.

Case No. 38644

Response to Interrogatories of Intervenor United Steelworkers of America

NOW COMES Plaintiff CHAMBER OF COMMERCE OF THE UNITED STATES ("Chamber") by its attorneys and pursuant to the Federal Rules of Civil Procedure answers the Interrogatories of the UNITED STEELWORKERS OF AMERICA dated April 28, 1973 as follows:

1. In response to Interrogatory #1, Plaintiff Chamber has this date filed with the Court a Motion for Re-Hearing concerning the subject matter thereof.

2. In response to Interrogatory numbered 2, the Chamber has no information except as has been set forth in the depositions previously taken in this cause and at which Intervenor UNITED STEELWORKERS OF AMERICA was present. There is no formal report regarding the receipt of unemployment compensation benefits to strikers made by or to the Chamber and the Chamber has no

studies or information concerning its members in this respect. On information and belief, any compiled information, records or data concerning this subject is maintained by the State of Michigan.

3. In response to Interrogatories numbered 3, 14, 16, and 18, the Chamber has no information except that which was given in previous depositions in this cause wherein Intervenor UNITED STEELWORKERS OF AMERICA was present and that contained in the affidavit of Herbert Northrup and study of Armand Thiebolt which is currently on file with the Court and has been served upon the other parties of this action.

4. In response to Interrogatories numbered 4, 5, and 6, the Chamber has no knowledge of any of the information requested therein.

5. In response to Interrogatories numbered 13, 15, 17, 19, 21, and 22, the Chamber has no knowledge of any of the information requested therein except that which is contained in the affidavit of Herbert Northrup and study of Armand Thiebolt.

6. In response to Interrogatory numbered 20, the answer of the Chamber is "no".

7. In response to Interrogatories numbered 7, 8, 10, 11, and 12 will be provided within the time period provided by the Court.

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October 18, 1974.

STATE OF MICHIGAN
COUNTY OF WAYNE } ss

I, ROBERT J. FINKEL, being duly sworn, state that I am local counsel for Plaintiff Chamber of Commerce of the United States and that upon information and belief the above and foregoing answers are true.

ROBERT J. FINKEL

Subscribed and Sworn to before me
this 18th day of October, 1974

.....

Notary Public, Macomb County, Mich
My Commission Expires: 11-13-76
(Acting in and for Wayne County)